

University of Michigan Law School

University of Michigan Law School Scholarship Repository

Book Chapters

Faculty Scholarship

1971

Searches without Warrants

Jerold H. Israel

University of Michigan Law School, israelj@umich.edu

Available at: https://repository.law.umich.edu/book_chapters/27

Follow this and additional works at: https://repository.law.umich.edu/book_chapters



Part of the [Criminal Procedure Commons](#), [Evidence Commons](#), [Fourth Amendment Commons](#), [Law Enforcement and Corrections Commons](#), [State and Local Government Law Commons](#), and the [Supreme Court of the United States Commons](#)

Publication Information & Recommended Citation

Israel, Jerold H. "Searches without Warrants." In *Michigan Criminal Practice*, 1-18. Ann Arbor, Mich.: Institute of Continuing Legal Education, 1971.

This Book Chapter is brought to you for free and open access by the Faculty Scholarship at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Book Chapters by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

CHAPTER ONE

SEARCHES WITHOUT WARRANTS

*Jerold Israel**

Basis of the Warrant Requirement

Although they are surely well-known to this audience, I take note at the outset of two basic principles that are the foundation for all that follows. First, under *Ker v. California*,¹ fourth amendment standards governing the constitutionality of searches are applicable to the states, and the states must, at a minimum, meet those standards. The states can impose a more restrictive standard, but they cannot impose a more lenient standard. Second, evidence obtained by a search which does not meet federal constitutional standards will not be admissible at trial. For many years there was some question in Michigan about the exclusion of certain types of evidence found outside dwellings, due to a special exception found in the Michigan Constitution.² That exception has now been laid to rest in the *Pennington*

* Professor of Law, The University of Michigan Law School, Ann Arbor, Michigan.

1. 374 U.S. 23 (1963).
2. Mich. Const. 1963, Art. 1, §11: "...The provisions of this section shall not be construed to bar from evidence in any criminal proceeding any narcotic drug, firearm, bomb, explosive or any other dangerous weapon, seized by a peace officer outside the curtilage of any dwelling house in this state."

2 / SEARCHES WITHOUT WARRANTS

case.³

My primary area of concentration today is the search made without a warrant. Studies indicate that 95 percent or more of all searches are without warrants. It is quite understandable, then, that most of the search-and-seizure litigation concerns the validity of searches without warrants.

The fourth amendment has two conjunctive clauses. The first guarantees the right of the people against unreasonable searches, and the second sets forth the conditions under which a warrant may issue. Only the second clause specifically refers to warrants. There has been considerable controversy over the years concerning the relationship between those two clauses. That relationship has been a source of division within both the United States Supreme Court and the Michigan appellate courts. One group of judges and justices has argued that the amendment does not create a special presumption favoring warrants: the first clause imposes a single, basic standard--reasonableness--and that standard can be readily met with or without a warrant. Another group of judges and justices has argued that the two clauses are closely related and the second clause referring to warrants largely defines the reasonableness requirement of the first.

Michigan decisions have generally tended to favor the former view.⁴ Opinions have been concerned primarily with the presence of probable cause, not with the failure of the officer to obtain a warrant. On the other hand, the United States Supreme Court, in the last few years, has definitely favored the latter approach, emphasizing the need for obtaining a warrant even where probable cause is clearly established. Illustrative is Justice Stewart's statement

3. *People v. Pennington*, 383 Mich. 611 (1970), *rev'g* 17 Mich. App. 398 (1969).

4. *See e.g.*, *People v. Cook*, 24 Mich. App. 401 (1970).

in *Katz v. United States*⁵:

...this Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end. Searches conducted without warrants have been held unlawful "notwithstanding facts unquestionably showing probable cause,..." for the Constitution requires "that the deliberate, impartial judgment of a judicial officer...be interposed between the citizen and the police...." ... "Over and over again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes", ...and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment--subject only to a few specifically established and well-delineated exceptions.

Exceptions to the Warrant Requirement

Although the United States Supreme Court is divided on this issue, Justice Stewart's position appears to be prevailing and it is, therefore, the view to which counsel must adapt their arguments. In particular, prosecutors, in defending searches without warrants, must be prepared to bring such searches within the "specifically established and well-delineated exceptions," noted Stewart, rather than simply point to the "general reasonableness" of the officer's action without particular regard for the lack of a warrant.

Although Justice Stewart refers to a "few

5. 389 U.S. 347, 356-7 (1967).

4 / SEARCHES WITHOUT WARRANTS

specifically established and well-delineated exceptions," there are several such exceptions justifying searches without a warrant. Most are well-established, but how well they are delineated is a matter of some debate. The search incident to an arrest is the most frequently used exception. Another is the moving vehicle exception, although it is probably best classified as one illustration of a larger category, the search without a warrant justified by "exigent circumstances." Another in this category is the search in the process of hot pursuit of a wanted person. Another exception is the custodial search. Included in this category are the inventory search of the person at the station and the search of the impounded vehicle. Consent to search also justifies lack of a warrant. Of course, if there is voluntary consent, the state need not show even probable cause. Similarly, there are those investigations that are not characterized as searches, such as observation, which may lead directly to seizure of material in open view (which also does not require a warrant).

Rather than explore each exception in all of its applications, I would like to consider warrantless searches of three basic "subjects"--the person, the car, and the building (whether office or home)--and examine the application of the relevant exceptions (excluding consent, which Judge Reisig will cover) to the search of each.

Search of the Person

Stop and Frisk

Let us start with the search of the person. First, consider the possible bearing of the last exception noted previously--investigative activities that are not treated as full-fledged searches. Most significant here is the so-called "frisk" of the person. The constitutionality of the frisk was established in *Terry v. Ohio*.⁶ A police officer

6. 392 U.S. 1 (1968).

observed three men in a downtown shopping area engaged in what he believed was the "casing" of a store for robbery. He approached them for questioning. But after an initial mumbled response, he frisked them; that is, he engaged in a "pat down." He felt a pistol in a breast pocket and removed a loaded weapon, which was introduced as evidence at trial. The officer obviously did not have a warrant and he could not justify his action as a search incident to an arrest because he lacked probable cause to make an arrest and had not made one. The Supreme Court nevertheless upheld the seizure of the weapon. It stressed that the frisk was subject to the fourth amendment, but lacked the intensity of a full search. Accordingly, the officer did not need full-fledged probable cause nor the warrant required for a full-fledged search. The Court held that when a police officer has reason to believe that the person with whom he is dealing (here, questioning) is armed and dangerous, he may make a frisk even though he does not have probable cause to arrest that person. He may do this for his own safety and the safety of others but he is limited to a frisk of the outer clothing in his attempt to discover weapons.

It is important to note that that case dealt with authority to frisk, not with the authority to stop. The Supreme Court left open the question of when an officer on less than probable cause can force a person to stop so that questions could be asked. In *Terry* itself he did not have to stop the individuals. Justice Harlan, in a concurring opinion, suggested that the Court could not logically sustain the frisk without also sustaining the stop. His view seems likely to prevail if the Court remains as presently composed. Of course, if the initial stop were invalid, then the subsequent frisk might also fall as the fruit of the poisonous tree.

The validity of the stop may also be crucial in sustaining another investigative technique that is not viewed as a search and therefore does not require a warrant. Take the case where the officer says, "I didn't search anybody. I stopped him to ask for an explanation of suspicious activity. He opened up his hand. There was a packet of narcotics in plain view, so I grabbed it." At the time the officer

6 / SEARCHES WITHOUT WARRANTS

made the seizure, he clearly had probable cause and a warrant is not needed because the officer had no opportunity to obtain one prior to the sudden appearance of the contraband. The key here is that the activities prior to the seizure did not violate the fourth amendment. But if the initial stop is invalid under the fourth amendment, the whole matter falls. The fourth amendment does not restrict observation of matter in plain view provided the officer has a right to be in a position to obtain that view. An illegal "stop" may place him outside that category. Moreover, the material is only in plain view because abandoned and the abandonment stems from the stop.

Assuming the validity of the stop, the frisk still must meet the limits imposed by the Court--a pat down for weapons, with no attempt, under *Terry*, to initially thrust hands into any pockets. Only after a weapon was felt did the officer reach into the pocket and remove the weapon. In this regard, I wonder how the courts will react when someone first demonstrates that guns don't always feel like guns. I have seen, for example, hollowed-out wallets that contained guns, yet feel like and have the appearance of an ordinary, rather stuffed wallet. Someday an officer is going to remove such a wallet, open it, and find that it contained marijuana, stolen jewels or some other contraband. The prosecutor had better be prepared to prove by exhibits that the officer reasonably could believe a weapon might be in such a case. Of course, this possibility, if recognized, would significantly increase that which might be removed in a frisk.

*People v. Evans*⁷ is a case that, in a way, may go beyond *Terry*. In the early morning in Detroit, police officers noticed a man walking rapidly down a street with a package. He apparently spotted the police and retreated into an alley, where they found him crouched behind some garbage cans. They knew of no crime that had been committed at that point. Yet they opened his package and found partially empty bottles of liquor. They reached into his pockets

7. 3 Mich. App. 1 (1966).

and pulled out more bottles of liquor. They later found that there had been a liquor store robbery and that the liquor came from that store. Defense argued that the search had been illegal. It was without a warrant and not incident to any arrest, since there was no probable cause to make an arrest and an arrest had not been made. The Michigan Court of Appeals said that while there was no probable cause to make an arrest, there was probable cause to make a search without regard to the arrest. The basis for the lack of a warrant, I guess, was a "moving vehicle" type of concept. Since he was not subject to arrest he could "move on." But even if this were accepted, the court is not altogether convincing in showing probable cause to search if one acknowledges lack of probable cause to arrest. To my knowledge, *Evans* has not been further developed in later cases.

Search Incident to an Arrest

As noted previously, the primary justification for the warrantless search of the person is the search-incident-to-a-valid-arrest exception. This exception is based upon the premise that the search must be undertaken immediately following arrest to insure that the arrested person does not have weapons and to prevent his possible destruction or concealment of weapons. Since the search is directed at more than weapons, it will be far more extensive than a frisk. But how extensive? Must the offense for which the arrest is made be such that the officer can believe that there is some evidence to be destroyed?

The Michigan Supreme Court has stated that when a man is stopped for a traffic violation, e.g., a bad headlight, ordinarily a search of the car cannot be made.⁸ The officer isn't likely to find evidence of a headlight violation or speeding violation in the car. Neither is he likely to find such evidence upon the driver's person, so a search of the person incident to such a stop would also appear to be invalid. Of course, this limitation does not neces-

8. *People v. Gonzales*, 356 Mich. 247 (1959).

8 / SEARCHES WITHOUT WARRANTS

sarily apply to all misdemeanors. There may be some traffic offenses that justify a search of the person. If an individual is arrested for "driving while under the influence," he might possess evidence that could be destroyed or concealed, such as the intoxicant or its empty container.

Assuming that the misdemeanor is of the type where evidence is not to be found, can the officer at least utilize a frisk? Does the *Terry* standard apply, or does the existence of the authority to arrest itself automatically justify a frisk for weapons? Language in *Gonzales* or *Terry* would suggest that, at least where the individual is not placed in custody, the *Terry* standard applies. What if the person is placed in custody--e.g., placed in the police vehicle and taken to the station--rather than released at the scene after issuance of an appearance ticket? Does the officer have an automatic right to engage in a frisk, even where the offense involved is a misdemeanor, before placing a person in custody? This is an open issue. Neither *Gonzales* nor similar cases deal with it. Certainly, one could not readily conclude that all persons taken into custody, by that fact alone, present a reasonable suspicion that they are armed. Yet, on the other hand, the arrested person placed in custody may be more likely to resort to force than the person who anticipates his on-site release. Also, the officer often is more vulnerable to attack when the arrested person is in the police vehicle.

Most felonies are such that evidence may be found on the person, so problems of this sort don't arise with felony arrests. A general search of the person is usually justified; but how thoroughly may the officer search? If the man, for example, is arrested for automobile theft, can the officer look through his wallet or a pill box found on his person? His wallet may very well contain some evidence (e.g., stolen registration papers), but the pill box is presumably too small to contain even such evidence. The courts have divided on this issue, some permitting a thorough search of everything found on the person incident to the arrest. The Michigan appellate courts, to my knowledge, have stated only that you

can make a man empty his pockets upon his arrest and take everything that is presented. In *People v. Jackson*,⁹ the arrested person was required to do exactly that and the officers seized a lighter which later was found to have been stolen from the robbery victim. The court upheld the admissibility of that evidence without any extensive discussion of the issue.

Custodial Search

One relevant factor here is the validity of the inventory or custodial search. Most persons arrested on felonies will be placed in jail for some period of time prior to arraignment on the warrant. Prior to being placed in a cell, their belongings will be removed and usually examined (i.e., pill boxes opened, contents of wallets examined, etc.). This is a standard practice, but it recently has been challenged, as to permissible scope, in the federal courts, with varying success. If the scope of the inventory search is limited, perhaps the court will be more willing to deal with the intensity of the search incident to a felony arrest because any limitations will be more meaningful. On the other hand, if a thorough inventory search without warrant is justified as a necessary incident of custodial detention, it seems likely that the courts would also grant greater scope to searches incident to felony arrests on the ground that the matter seized would eventually be examined in the inventory search.

One major problem related to search incident to arrest that has been directly answered is the requisite chronological order of the search and final arrest. The Michigan courts have recognized that the search is still incident to an arrest even if the officer stops, searches, and then tells the person he is under arrest. The key is that the search and the arrest be contemporaneous and that the officer intend to arrest from the outset.¹⁰

9. 11 Mich. App. 630 (1968).

10. *People v. Pankin*, 4 Mich. App. 19 (1966).

10 / SEARCHES WITHOUT WARRANTS

Search of a Car

Let us move now to the search of the vehicle. Here again, examination that falls short of a search will not require a warrant, or for that matter, even probable cause. The primary technique here is the observation of matter in plain view. (With respect to automobiles, I know of no counterpart to the frisk of the person.) Of course, the plain-view doctrine requires that the officer have legitimately been in a position that entitled him to have that view. In most reported cases, the officer observed matter within a car that he had stopped, but the stops were justified by traffic law violations.¹¹ What if there had been no traffic violation? A state statute authorizes an officer to demand that a driver show his license. Can he legitimately stop any car for this purpose? Courts have upheld such "inspection stops" when applied to a group of vehicles selected on a random basis, but it is questionable whether the state can condition the right to drive on the relinquishment of at least that protection that would be afforded a pedestrian before an officer could single him out for the purpose of stopping him.¹² The issue remains open. Some have suggested that *Henry*¹³ holds that all individual vehicle stops constitute arrests and must be justified by probable cause. In *Henry*, however, the government conceded the point, and *Rios*¹⁴ indicates the issue is open. It has largely been avoided because officers have been able, by one means or another, to find traffic violations that justify stops.

Search Incident to an Arrest

When it comes to physical search of the car without a warrant, the primary justification advanced in prior cases has been that the search was incident

11. See e.g., *People v. Kuntze*, 371 Mich. 419 (1963).

12. See discussion of *Terry*, *supra*.

13. *Henry v. United States*, 361 U.S. 98 (1959).

14. *Rios v. United States*, 364 U.S. 253 (1960).

to an arrest. As noted previously, this is limited by the type of arrest. Traffic arrests ordinarily do not permit searches incident thereto. In *People v. Lee*,¹⁵ police stopped a driver for one traffic offense and the officer requested that he get out of the car so the officer could check the car brakes. The officer pushed aside a cushion in the front seat as he entered the car and found a revolver there. The court said that because the man had violated one traffic rule, relating to lights, that did not create probable cause to believe that there was a violation also relating to the brakes. Since the entry for that purpose was illegal, the discovery of weapons incident thereto was an invalid search (this was not plain view, as a cushion was removed).

If the arrest is for a felony, the possibility usually exists that evidence of the crime might be within the possession of the arrested person. The scope of that search is so limited, however. *Chimel v. California*¹⁶ suggests that the search may only extend to the area within the person's control--the area into which he might reach in order to grasp a weapon or evidentiary item. This seemingly would exclude a locked glove compartment or the trunk of a car incident to arrest. Indeed, it might not reach the front seat if the person has been removed from the car when the search is made, as that area is no longer within his immediate control. Thus, after *Chimel*, the problem considered in cases like *Foster*,¹⁷ *Johnnie Mae Jones*,¹⁸ and *Dombrowski*¹⁹ may no longer be of practical significance for post-*Chimel* searches. In *Dombrowski* the defendant was arrested and his car was searched at that point, but the officers could not find the key to the trunk because he had hidden it. At the station, the key was found in the process of a custodial search of the person. The officers then returned to the car and opened up the trunk. The Michigan Court of Appeals said that the officers

15. 371 Mich. 573 (1963).

16. 395 U.S. 752 (1969).

17. *People v. Foster*, 17 Mich. App. 430 (1969).

18. *People v. Johnnie Mae Jones*, 12 Mich. App. 367 (1968).

19. *People v. Dombrowski*, 10 Mich. App. 445 (1968).

12 / SEARCHES WITHOUT WARRANTS

should have obtained a warrant, since the search was no longer incident to the arrest. In *Jones* the defendant was taken into custody and transported to the station and the officers returned immediately to search the car. The Court of Appeals viewed this as a borderline case and held the search incident to the arrest after noting that the police were subject to harrassment that may have prevented an immediate search. They also noted that defendant had not been booked. It was possible that a search might not reveal any relevant evidence and defendant might have been released. Since the defendant was not present in either case, *Chimel* indicates neither search could be sustained today as incident to an arrest. Authority to search without a warrant in such cases must come from another "exception," and that exception is the "moving vehicle" exception noted in *Chambers v. Maroney*.²⁰

"Moving Vehicle" Exception

Police officers in *Chambers* were investigating a recent gasoline station robbery when they stopped a car with probable cause to believe the driver and passengers had been involved in the robbery. But they did not search the car at that point. They took the men to the station and booked them, then went back to search the car and found weapons and stolen identification cards. The Court said the search was not incident to arrest, but was still justified without a warrant since the vehicle was capable of being moved and there was therefore no opportunity to obtain a warrant. The police had not impounded the car and they could not be required to do so as an alternative to the search. Although the driver and passengers were in custody, this did not preclude others from taking the car. The Court stressed, however, that the search, since it was not justified by the arrest, was based upon the existence of probable cause relating to the car itself--probable cause that it contained relevant evidence, since it apparently had been used in the robbery only a few hours before. Probable cause relating to the car will not exist in all cases involving felony arrests. In

20. 399 U.S. 42 (1970).

People v. Carter,²¹ the Michigan appellate court indicated that *Chambers* would apply to an automobile that had apparently been used in the robbery several hours before. Although there had been some opportunity to remove contraband, probable cause to believe that the car contained contraband would still exist. But what if there had been no evidence that the car had been used in the robbery? Can we ordinarily assume that it is a logical place to have loot stored, as would be the home? What if the crime does not involve loot (e.g., a rape) and did not occur in the car? Can we nevertheless treat it as a likely source of evidence, such as fingerprints or footprints that might match those found at the scene of the crime? Also, how much time may elapse before the search is undertaken? In *Carter*, the officers waited three days after initially seizing the car. The justification for the lack of warrant in *Maroney* was the possible removal of the car, but this delay in the search certainly indicated no such concern. The officers had ample time to obtain a warrant, and the court of appeals stated *Chambers*, therefore, would not apply (reversal was not required, however, because admission of the evidence seized was harmless error). The same difficulty might arise when the officers had ample time to obtain a warrant before they sought out a car to be searched. For example, what if, in *Chambers*, they had been aware of Mr. Chambers' involvement in the crime several days before they stopped him, but had failed to obtain a warrant to search the car? Can they now justify a search without a warrant on the ground that their "hand" has now been "tipped," and the car might be removed before they can get the warrant?

Custodial Examination of a Car

One other significant exception to the warrant requirement is the custodial examination of a car. If the car is impounded, i.e., it is seized as police property subject to forfeiture as in narcotics cases, then it is in police custody and a subsequent search without a warrant may be justified, though days later,

21. 28 Mich. App. 83 (1970).

on an inventory theory.²² The *Cooper* case was extended in *People v. Cook*²³ to an automobile that had been impounded as the instrumentality utilized in a child molesting offense. The court there argued, in effect, that since the entire car was seized as evidence, the more thorough examination at a later date did not constitute a new search. The crucial issue was the authority to seize the car and that was justified by probable cause that it had been used in the offense. I wonder how far the court will carry this doctrine. Certainly, it would not be applied to a "seizure" of a house in which an offense occurred at the time of arrest and then a subsequent search of the house without a warrant. A crucial aspect in *Cook* may be that the subsequent "search" was no more than the removal of fingerprints found on various portions of the car. In both *Cook* and *Cooper*, the utilization of the car in the commission of a felony to which the evidence related was important. The D.C. Court of Appeals has held that contraband found in a car impounded following a minor traffic offense was not admissible.²⁴

The limitations of the *Chambers* doctrine as well as *Cooper* are indicated by the Supreme Court decision in *Coolidge v. New Hampshire*,²⁵ which came after this lecture was delivered. In that case, the police had obtained probable cause to believe that the defendant had murdered a young female. They did obtain a warrant authorizing search of the car, before they went to defendant's house, where he was arrested. The car was located in the driveway at the time. It was subsequently towed to the police station and there searched. Vacuum sweepings from the car were introduced into evidence at trial. The warrant was held to be invalid since it was not issued by "a neutral and detached magistrate," but rather by the state attorney general, who was acting in his capacity as a "justice of the peace." A majority of the Court also held that the search could

22. See *Cooper v. California*, 386 U.S. 58 (1967).

23. 24 Mich. App. 401 (1970).

24. *Mayfield v. United States*, 9 Cr. Law Rptr. 2115 (1971).

25. 399 U.S. 926 (1970).

not be justified without a warrant. The major opinion on this issue was joined by only four justices. They rejected application of the *Chambers* decision on the ground that the police had known of the probable role of the car for some time, the petitioner had had ample opportunity to destroy any incriminating evidence in the car, the house had been guarded at the time of the arrest, and the petitioner and his spouse had been denied any access to the car. The prosecution also sought to argue that the car had been seized as a matter in plain view, presumably as an instrument of the crime, and that the subsequent search was therefore valid. The four justices argued, however, that the plain-view doctrine could not be applied to the seizure of the car as a whole. This was not a case where the police officer inadvertently came across evidence in the process of an otherwise valid search. Here again the justices emphasized that the police had ample opportunity to obtain a warrant; they knew the automobile's exact description and location well in advance; they had intended to seize it when they first came upon defendant's property; and the car was not contraband or stolen goods or an object dangerous in itself. The fifth justice, Justice Harlan, concurred in the conclusion that the search could not be justified without a warrant, but did not join in all of the reasoning of the plurality opinion. He did state, however, that a "contrary result in this case would, I fear, go far towards relegating the warrant requirement of the fourth amendment to a position of little consequence in federal search and seizure law, a course which seems to be opposite to the one we took in *Chimel*."

Search of a Building

Let me now turn to the third area of concern--the search of the building. Here again, almost all of the exceptions noted previously will come into play. Plain view will be a significant justification, but, again, its validity depends upon a lawful initial entry into the house that placed the officer in a position to have that plain view. In this area, perhaps the most significant current question is

whether officers may enter a house for the purpose of making an arrest without previously having obtained an arrest warrant, despite the fact that opportunity to obtain the warrant was present. The Michigan Court of Appeals suggested that an arrest warrant will not be necessary in such a situation.²⁶ The issue was recently noted by the United States Supreme Court in *Coolidge*, with the majority indicating that it was an "open" issue.

Assuming that we have a "full-fledged search" rather than an observation justified under the plain-view doctrine, there is very limited scope for a search without a warrant. Under the *Chimel* case, as previously noted, the search, if justified as incident to an arrest, is limited to the area within the immediate control of the arrestee. Presumably this frequently would not even extend to a bookshelf or desk located across the room. Of course, if the arrestee is permitted to go into another room, or to open a drawer (e.g., for the purpose of removing clothing) the police may search that area prior to such activity.²⁷

So far, the court has been unwilling, with respect to the homes, to recognize a doctrinal counterpart of the moving vehicle exception--an exception justifying search of a home without a warrant when there is a possibility that another returning to the home would seize any evidence located there before the officers could obtain a warrant. This issue was presented, at least in part, in the *Vale* case.²⁸ In that case, petitioner was arrested on the porch, and his house was subsequently searched. The attempt to justify the search as incident to the arrest was easily rejected, even though the search occurred before *Chimel* and therefore was not subject to that ruling. Justice Black, in dissent, argued that the police should have been permitted to search the house on the thesis that *Vale's* mother and brother

26. See *People v. Herrera*, 19 Mich. App. 216 (1969). But compare *Dorman v. United States*, 435 F.2d 385 (D.C. Cir. 1970).

27. See *People v. Giacalone*, 23 Mich. App. 163 (1970).

28. *Vale v. Louisiana*, 399 U.S. 30 (1970).

had arrived shortly after the arrest and were aware of Vale's arrest for an alleged narcotics transfer. Presumably, they would also be aware of narcotics in the home and could destroy such narcotics while the police officers were obtaining a warrant. The majority did not respond directly to this point, although they did note that at the time the officers first entered the premises, and presumably began the search, the mother and brother had not yet arrived. Certainly, a reasonable implication of the opinion is that the officers should have either prevented the mother and brother from entering the home until they could obtain a warrant, or one officer might have remained with the mother and brother while they sought the warrant. While one might argue that the same procedures could often be applied to automobile searches, the Court's opinions indicate that they do not view privacy within the automobile as nearly as significant as that within the home.

If Vale had evaded arrest on the front porch and had gone into the home, the police officers presumably could have followed him "in hot pursuit" and might have seized any item which they found in plain view. Indeed, under *Warden v. Hayden*,²⁹ they presumably could have searched for any weapons which might be seized while they were in the process of looking for him. In *Warden*, in the pursuit of a suspect, an officer looked inside a washing machine, apparently to find weapons, and discovered a bloody shirt, which he seized. In the *Carter* case, the officers, while pursuing a fleeing felon, seized a pair of red shoes smeared with white paint and a brown paper sack containing money. However, the court there excluded evidence which was seized after the officers had made a determination that the suspect had left the building and the apartment was properly secured by officers. At that time, before conducting a further search, they should have obtained a warrant.

Much more could be said concerning the search of the building. Because of the shortage of time,

29. 387 U.S. 294 (1967).

18 / SEARCHES WITHOUT WARRANTS

I have not treated it as extensively as the search of a person or the automobile. A general rule, one can safely say, is that the likelihood of justifying a search of a building without a warrant is far less than that of justifying a warrantless search either of the person or of the automobile.